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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANN CAVANAUGH, ET AL., Plaintiffs and Appellants, v. PATRICIA A. BERNEY, Defendant and Respondent.	B143254 (Los Angeles County Super. Ct. No. NP007073)

Appeal from a judgment of the Superior Court of Los Angeles County. Richard Charvet, Judge. Reversed.

Cayer & Craton and Curt R. Craton for Plaintiff and Appellant.

Law Offices of Donald R. Clinebell and Donald R. Clinebell for Defendant and Respondent.

In this case, the petitioners and appellants, Ann Cavanaugh, Shirley Alexander and Joan Watson (appellants), attack a testamentary trust document executed by their grandmother, the decedent Wilma A. Martz (decedent), as having been procured by the undue influence of the respondent Patricia Berney (respondent). The undisputed evidence demonstrated that the presumption of undue influence was applicable, shifting the burden of proof. Because the trial court, in finding in favor of respondent, failed to apply that presumption and recognize that the burden of proof had shifted, we must reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Decedent passed away on May 1, 1997. Nearly eleven years earlier, she had executed, on September 18, 1986, (1) a revocable living trust, (2) a pour over will, (3) a bill of transfer of all of her assets into the 1986 trust and (4) a general power of appointment (hereafter, collectively the 1986 trust). Her two children, Ronald Teters and respondent were the beneficiaries of the 1986 trust and were to share equally. The trust instrument provided that if either of them were to predecease decedent then their share would go to his or her issue.

Mr. Teters died on February 14, 1994. He was survived by his three children, who are the appellants herein. Decedent was shocked and devastated by the death of her son

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[1] The facts we recite are based upon undisputed evidence, including admissions by respondent presented at trial as to which the trial court failed to make findings as requested by appellants. We therefore may not draw inferences in favor of respondent as to such evidence

and was described in the testimony of respondent as "stunned," "confused" and "visibly upset." As a result of their father's death, and under the provisions of the 1986 trust, appellants were then entitled to receive his 50% share of decedent's estate.

Less than four weeks after Mr. Teters's death, however, on March 9, 1995, decedent executed an entirely different testamentary scheme in the form of a new revocable living trust and related documents (hereafter, the 1994 trust). Under this trust instrument, respondent was the *sole* beneficiary.[2]

Following decedent's death in 1997, appellants learned of information that caused them to believe that decedent's decision in 1994 to replace the 1986 trust and to disinherit them had resulted from respondent's undue influence over the decedent. Therefore, on September 17, 1998, they filed the instant petition to contest the 1994 trust and to impress a constructive trust on certain assets that respondent had caused to be transferred to herself under the terms of that trust.

The case came to trial on February 18, 2000, and was heard by the court sitting without a jury over a three-day period (February 18 and 29 and March 1, 2000). During the trial, appellants argued that they were entitled to the benefit of a presumption of undue influence that would place the burden of proof on respondent to prove the absence

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[2] In the relevant clause in Article IV of the 1994 trust, it is provided:

"Whereas, upon the death of the [decedent], and after making distribution of any and all items covered by the Letter of Instruction (relating to personal effects or household goods), . . ., the TRUSTEE shall allocate and distribute the entire rest, residue and remainder of the TRUST ESTATE, free of TRUST to her sole BENEFICIARY and SUCCESSOR TRUSTEE, Patricia A. Berney."

of such influence in the procurement and execution of the 1994 trust. The evidence in support of their argument was based on the stipulation of the parties that respondent had, in 1994, a confidential relationship with the decedent, the testimony of respondent concerning her activities relating to the execution of the 1994 trust and the obvious fact that she received a significant benefit (which appellants characterize as "undue) from the trust since her share of decedent's estate went from 50% to 100%. Respondent's testimony concerning her activities relating to the execution of the 1994 trust consisted, in part, of the following:

1. She located, selected and contacted a paralegal service to prepare the 1994 trust; she testified that the decedent had instructed her to "find an attorney," but she went to a paralegal service close to her home in Dana Point because it was cheaper;

2. She instructed the paralegal service as to what provisions were to be put into the 1994 trust instruments; she testified, however, that such instructions reflected what decedent had told her that decedent wanted to do. The court later stated that it found such testimony credible.

3. She picked up the completed 1994 trust documents from the paralegal service and took them to decedent's home; she also arranged for a witness and a notary to come to decedent's home for the execution of the documents;

4. Decedent only read some of the documents; respondent assured her that they had been drafted in accordance with decedent's expressed wishes; there was no attorney present nor was a representative of the paralegal service present. The notary did not explain any of the provisions of the 1994 trust documents to decedent;

5. Following execution of the 1994 trust documents, respondent retained the originals in her personal safe; she told no one (other than her husband) that decedent had executed a new trust instrument. Indeed, she did not tell appellants about it until *after* decedent's death on May 1, 1997.

As already noted, following the death of decedent, appellants learned that a new trust had been executed that disinherited them. They then filed the instant petition in the trial court contesting the validity of the 1994 trust on the ground of undue influence.[3] Following a bench trial conducted over a three-day period, the trial rejected appellants' argument that the evidence required the application of a presumption of undue influence that would place the burden of proof on respondent to demonstrate the absence of such influence.

The trial court held that while there was no dispute that a confidential relationship existed between respondent and decedent, it would *not* find that respondent had actively participated in either the preparation or execution of the 1994 trust. In the court's view, respondent's *undisputed* actions (described above) amounted to nothing more than respondent "carrying out [decedent's] expressed intentions and desires." In addition, the

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[3] In their petition, appellants alleged that (1) decedent, at the time of the execution of the 1994 trust (which was just three weeks after the untimely death of their father, was "not of sound and disposing mind," (2) the 1994 trust was executed as a direct result of the undue influence exercised by respondent over decedent and (3) the 1994 trust was not executed in the manner and form required by law for the execution of a trust.

court concluded that the total disinheritance of appellants in favor of bequeathing 100% of her assets to respondent did *not* constitute an unnatural disposition by decedent.[4]

Based on its determination that there was no basis to apply a presumption of undue influence, the court concluded that appellants had failed to carry *their* burden of proof to demonstrate the invalidity of the 1994 trust. The court stated that it accepted as credible the testimony of respondent that she was simply carrying out the "expressed instructions and desires" of decedent who was, at that time, "mentally competent."

Appellants requested a statement of decision and respondent's counsel filed a "response" to such request which constituted respondent's view as to how the court's statement of decision should read. The court adopted verbatim respondent's proposed statement as its own and filed it on July 19, 2000. A judgment in favor of respondent was filed on the same day. Appellants have filed this timely appeal.

ISSUE RAISED

The principal issue raised by appellants is that the trial court erred, as a matter of law, in refusing to apply the undue influence presumption. Appellants argue that the undisputed evidence demonstrated that the presumption arose and should have governed

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[4] In announcing its decision from the bench, the trial court stated: "I'm finding . . . that this change, the 1994 trust, is a natural disposition giving everything to her sole surviving daughter. This is a person who was carry for her mother over a long period of time. [¶] There simply was not a close relationship between [decedent] and her grandchildren."

the trial court's fact finding process; that is, the burden of proof should not have been on appellants to establish undue influence but rather on respondent to prove its absence.

As indicated at the outset if this opinion, we find that this argument has merit and that the matter must be sent back for a new trial with the burden of proof on respondent to demonstrate the absence of undue influence. We recognize that the trial court may well, in view of the strength of its remarks from the bench, reach the same result. Nonetheless, the error here goes to such a fundamental point of evidentiary procedure, we are compelled to reverse.[5]

DISCUSSION

The issue presented by appellants is one of law. In the presence of a pure question of law, our standard of review is de novo. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271.) In conducting that review, we are not bound by the interpretation or application of the law made by the trial court.

1. *The Presumption of Undue Influence*

Under California law, a presumption of undue influence arises when the following three elements are established by the evidence: (1) there is a confidential or fiduciary relationship in existence between the testator and the person alleged to have exercised the undue influence, (2) there is *active participation* by such person in the preparation *or*

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[5] In light of this result, there is no need for us to consider or discuss the other claims of error which relate solely to evidentiary and procedural matters. To the extent that any error was made, we see no reason to expect that it will be repeated on retrial.

execution of the will and (3) there is an undue benefit to such person or another person, under the will thus procured. (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 861-862.)

Once these three elements are established (and appellants had the burden of establishing them), the presumption of undue influence arises. It is a rebuttable presumption. (*Estate of Peters* (1970) 9 Cal.App.3d 916, 922; Evid. Code, §§ 600 and 601.)[6] The presumption is one that affects the burden of proof "since it is established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied. [Citations.]" (*Estate of Gelonese*, *supra*, 36 Cal.App.3d at p. 862.) The public policy here involved is the one relating to "the security of those who entrust themselves or their property to the administration of others." (*Ibid.*; Evid. Code, § 605.)

" 'The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.' ([Evid. Code,] § 606.) Accordingly, when the contestant has shown by a preponderance of the evidence that the proponent of a will sustained a confidential

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[6] Evidence Code sections 600 and 601 provide:

Section 600: "(a) A presumption is an assumption of fact that the law requires to be made from another fat or group of facts found or otherwise established in the action. A presumption is not evidence. [¶] (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

Section 601:

"A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."

relationship toward the testator, actively participated in procuring the execution of the will, and unduly profited thereby, a presumption of undue influence, i.e., the presumed fact, arises, and the burden then shifts to the proponent to prove that the will was not induced by his undue influence. [Citations.] This burden requires that the proponent produce proof by a preponderance of the evidence that the will was not induced by his undue influence. [Citations.] (*Estate of Gelonese, supra,* 36 Cal.App.3d at p. 863.)

2. *A Confidential Relationship Existed*

The first element of the three necessary predicates to the existence of the presumption is clearly satisfied here. Indeed, the parties stipulated to it, a circumstance which the trial court recognized and counsel for respondent expressly acknowledged.

3. *Respondent Actively Participated In The Preparation Of The 1994 Trust*

The undisputed facts demonstrate that respondent actively participated in both the preparation and execution of the 1994 trust. While it may be disputed as to just what motivated the decedent to execute a change to her existing testamentary plan, there is no question that just three week after the death of her son, respondent located, selected and contacted the paralegal service that drew up the 1994 trust and instructed that service on the changes to be made. Respondent then obtained the prepared documents, took them to decedent's home and procured a notary and a witness in order to facilitate execution. That she claims to have done all of this in strict accordance with decedent's instructions may be relevant to the *ultimate* question of undue influence, but it is irrelevant to the question of respondent's *active participation* in the "preparation or execution" of the 1994 trust. The former issue is the *ultimate* question to be answered by the trier of fact,

but the latter relates to the important consideration of who will have the burden of proof on that ultimate question.

In one case, for example, sufficient evidence of active participation on the part of the testatrix's sister was found to exist where the sister, the chief beneficiary under the will, discussed the matter of a will with the testatrix on several occasions; went with the testatrix to the attorney's office where the will was prepared; arranged for the attorney to bring the will to the sister's home; asked the subscribing witnesses to witness the will; and would not permit the testatrix to go to her home in another state after her son's death. (*Estate of Rutherford* (1957) 153 Cal.App.2d 365, 372; see also *Estate of Gelonese*, *supra*, 36 Cal.App.3d at pp. 865-866.)

We have no trouble concluding, as a matter of law, that respondent's undisputed actions amounted to the required "active participation," and that the second element needed to justify imposition of the presumption was satisfied. In rejecting this conclusion, the trial court went right to the ultimate issue of undue influence and held that respondent was carrying out decedent's instructions and therefore her actions could not amount to "active participation." This placed the cart before the horse and failed to recognize that the significance of respondent's activities was a more limited question relating solely to the existence of the presumption. The trial court thus erred in not finding that respondent had actively participated in the preparation and execution of the 1994 trust.

4. *The Testamentary Disposition Of The 1994 Trust Resulted In An Undue Benefit To Respondent.*

While decedent was free to disinherit the surviving children of her recently deceased son, there is no question that this altered the previous testamentary scheme in a radical way. Under the 1986 trust, appellants, upon the death of their father prior to the passing of decedent, would have received his 50% share of decedent's estate. The execution of the 1994 will resulted in the abandonment of that existing testamentary plan which had provided for a natural disposition of decedent's estate and gave 100% of the estate to respondent. That respondent may have been a natural object of decedent's bounty does not alter the conclusion that she received an undue benefit from this change. To hold otherwise, would preclude the application of the presumption of undue influence in any case where a testamentary instrument benefited a natural heir at the expense of other natural heirs.

In addition, to the extent that the trial court relied on evidence of the relationship that either respondent or appellants had with the decedent prior to her death, *but after execution of the 1994 trust*, it was error. Such evidence is not relevant on the issue of whether respondent *unduly* benefited from the 1994 trust. Upon remand, the court should limit such evidence to matters occurring prior to the execution of that instrument.

We thus conclude that this third element of undue benefit to the proponent of the 1994 trust was satisfied.

CONCLUSION

Given that all three elements needed to raise the presumption were clearly satisfied, the trial court should have applied it and evaluated the evidence in the light that it was *respondent's* burden to prove the *absence* of undue influence. We cannot determine, as a matter of law, that undue influence was or was not present in this case. The presence or absence of undue influence is a question for the trier of fact, not this court. (*Estate of Gelonese, supra,* 36 Cal.App.3d at p. 867.) The question must be resolved, however, in the context of placing the burden of proof on the proper party. That was not done here. We therefore must reverse and remand.

DISPOSITION

The judgment is reversed. The appellants shall recover their costs on appeal.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.